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No. 75-95

In the Supreme Court of the United States

OCTOBER TERM, 1975

STATE OF TENNESSEE, ET AL., PETITIONERS

v.

BILLY DON DUNLAP

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will discuss the question whether a military commander's denial of a National Guard Technician's application for re-enlistment in the National Guard is subject to judicial review.

INTEREST OF THE UNITED STATES

Petitioners raise the broad question whether, and, if so, to what extent, a military commander's decision to deny re-enlistment to enlisted personnel is subject to judicial review. A decision on this broad question could significantly affect the interests of the military services of the United States.

Moreover, this question arises in a context in which the interests of the United States are directly

implicated. Respondent challenges a decision by the Tennessee Air National Guard denying his application for re-enlistment. As a consequence of that refusal, respondent's membership in the National Guard expired at the end of his term of enlistment, and he became ineligible to continue in his civilian employment as a National Guard Technician under the National Guard Technicians Act of 1968, 32 U.S.C. 709. That Act is administered by the adjutants general of the States under regulations issued by the Secretaries of the Army and the Air Force, and National Guard Technicians employed thereunder are employees of the United States. Thus, the decision in this case may directly affect respondent's employment rights with the United States.

Furthermore, by agreement with the Civil Service Commission, both the Army and the Air Force have established Reserve Technician programs essentially similar to the National Guard Technician program. The decision in this case may affect the operation of those Reserve Technician programs.

STATEMENT

From 1967 through 1972, respondent was an enlisted member of the Tennessee Air National Guard; during that time, he also was employed as an Air National Guard Technician under the National Guard Technicians Act of 1968, 32 U.S.C. 709 (Pet. App. B, p. A–7). Membership in the National Guard was a condition of respondent's employment under that Act. National Guard Technicians are members of the National Guard who have been employed in a civilian

capacity to perform paramilitary duties for their unit during the regular work week. See pp. 5–7, *infra*. The Act provides that a National Guard Technician "who is separated from the National Guard * * * shall be promptly separated from his technician employment * * *." 32 U.S.C. 709(e)(1); see also 32 U.S.C. 709(b).

Respondent's final term of enlistment expired on December 8, 1972 (Pet. App. B, p. A–7). Prior to that date, respondent submitted an application for reenlistment, which was denied by the commanding officer of his unit; an advisory board of officers convened by the commanding officer concurred in the denial (*id.*, at pp. A–7 to A–8). Accordingly, respondent was discharged from the National Guard on December 8, 1972 (*id.*, at p. A–8).

Shortly thereafter, respondent received notification that his employment as a National Guard Technician would be terminated effective January 12, 1973, because of his separation from the National Guard (Pet. App. B, p. A–8). His employment as a National Guard Technician was duly terminated on that date (*id.*, at p. A–7). Respondent appealed his separation from employment to the Adjutant General of the Tennessee National Guard (see 32 U.S.C. 709(e)(5)), who apparently denied relief.[1]

[1] Respondent's papers do not show the disposition of his administrative appeal. The courts below treated the appeal as having been decided adversely to respondent (Pet. App. A, p. A–3). Petitioners have not suggested that respondent failed to exhaust his administrative remedies.

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Respondent then instituted this action in the United States District Court for the Eastern District of Tennessee, contending that he had been unlawfully denied re-enlistment in the National Guard and seeking both re-enlistment and reinstatement as an Air National Guard Technician with back pay. In particular, respondent alleged that the denial of his application for re-enlistment "was calculated to culminate in [respondent's] discharge from his technician's job and * * * frustrate or deny any opportunity for him to effectively pursue an administrative remedy" (Pet. App. D, p. A–23). The district court granted petitioners' motion to dismiss, holding that it was "without the power to review the denial of [respondent's] request for re-enlistment in the Tennessee Air National Guard, in the absence of extraordinary circumstances" (Pet. App. B, p. A–13).

The court of appeals reversed. The court recognized the existence of the "doctrine of nonreviewability of military decisions" (Pet. App. A, p. A–4) but concluded that "decisions which are made for non-military reasons involving no application of military expertise [are] outside the boundaries of the doctrine of nonreviewability" (*id.*, at p. A–5). The court assumed that a decision to deny re-enlistment "made for the purpose of affecting a guardsman's technician employment" was not one made "for military reasons" (*ibid.*). The court further noted that during his term of enlistment, a National Guard Technician may be removed from employment as a technician only "for cause" (32 U.S.C. 709(e)(3)), and it concluded that

judicial review of the grounds for the denial of respondent's application for re-enlistment was necessary to vindicate his "'* * * interest in * * * continued employment' as a technician with the Tennessee Air National Guard" (Pet. App. A, p. A–6).

The court remanded to the district court to provide respondent "an opportunity to prove his allegation that [his commanding officer's] decision [to deny the application for re-enlistment] was made for other than military reasons" (*ibid.*).

INTRODUCTION AND SUMMARY OF ARGUMENT

Proper analysis of this case requires an understanding of the nature of civilian employment as an Air National Guard Technician. Under the National Guard Technicians Act of 1968, 32 U.S.C. 709, membership in the Air National Guard is a prerequisite to initial employment as an Air National Guard Technician (32 U.S.C. 709(b)) and is a condition of a Technician's continued employment (32 U.S.C. 709(e)(1)).[2] Technician positions are a hybrid of military responsibility and civilian employment. During the regular work week, the Technician is

[2] The Secretary of the Air Force may by regulation exempt Technicians from the requirement of membership in the National Guard. 32 U.S.C. 709(b). The purpose of this provision is to permit exemption of a very limited number of non-combat personnel, such as secretaries and clerk-typists. H.R. Rep. No. 1823, 90th Cong., 2d Sess. 6–7 (1968). Exempted positions are held in the competitive civil service. 32 U.S.C. 709(d). However, combat personnel such as respondent have not been exempted from the requirement of membership in the National Guard, and the discussion in this brief will focus exclusively upon Technicians who are subject to that requirement.

assigned to the National Guard unit of which he is a member, and he discharges essentially military responsibilities in his capacity as a civilian employee. At weekend drills of the unit, the Technician continues to carry out the same responsibilities, but in his capacity as a member of the National Guard.

The purpose of the Technician program is to maintain the combat readiness of the National Guard. H.R. Rep. No. 411, 92d Cong., 1st Sess. 5 (1971).[3] The Technicians are the heart of a National Guard unit. They provide a nucleus of highly trained soldiers who are prepared to perform the operational functions of a main force military unit from the instant of mobilization, while simultaneously training the remaining members of the unit in their military responsibilities. *Ibid.* See *Baum* v. *Zuckert*, 342 F. 2d 145, 146 (C.A. 6). Such a nucleus of essentially on-duty soldiers is especially important in maintaining the preparedness of an Air National Guard unit, which is expected to be ready for combat or mission deployment within 48 hours of mobilization. H.R. Rep. No. 411, *supra*, at 5.

Membership in the National Guard is a condition of employment as a Technician because military service is a concomitant of the Technician's job responsibilities;[4] to fulfill the purpose of his employment, the Technician must train with his unit and enter active duty with his unit when it is mobilized. 32 U.S.C.

[3] The Act authorizes civilian employment of 53,100 Technicians. 32 U.S.C. (Supp. I) 709(h).

[4] The constitutionality of this requirement was upheld in *Local 571, National Army & Air Technicians Association* v. *Brink*, D. D.C., No. 2688–70, decided June 20, 1972.

709(b); H.R. Rep. No. 411, *supra*, at 2; H.R. Rep. No. 1823, 90th Cong., 2d Sess. 1–2 (1968). Although nominally civilian,[5] as a practical matter employment as a Technician is military in nature.[6]

1. As an enlisted member of the Tennessee Air National Guard, respondent had no entitlement to re-enlistment. While the armed services are empowered to accept enlistments in the National Guard, the authorizing statute confers no right of re-enlistment upon a member that would affect the military's otherwise absolute discretion in manpower selection. The regulations issued by the Secretary of the Air Force for processing applications for re-enlistment in the Air National Guard did not grant respondent even a qualified right of re-enlistment. The regulations provide that re-enlistment decisions are subject to the exercise of discretion at several levels within the military command structure. Similarly, respondent's con-

[5] A Technician holds his position in the noncompetitive federal civil service. 32 U.S.C. 709(d); H.R. Rep. No. 1823, *supra*, at 6. Until 1968, Technicians were state employees. H.R. Rep. No. 411, *supra*, at 1–2. In that year, they were made federal employees. 32 U.S.C. 709. But in passing the National Guard Technicians Act, Congress recognized the military nature and state character of the Technician program by authorizing the state adjutants general to continue to hire and supervise the Technicians, subject to regulations promulgated by the Secretaries of the Army and Air Force. 32 U.S.C. 709(c). H.R. Rep. No. 1823, *supra*, at 11–12. See Hearings on S. 3865 before Subcommittee No. 2 of the House Armed Services Committee, 90th Cong., 2d Sess., p. 10179 (1968).

[6] There is controversy over whether Technicians may be required to wear military uniforms while acting in their "civilian" capacities. See, *e.g.*, *Montana Chapter of Association of Civilian Technicians, Inc.* v. *Young*, 514 F. 2d 1165 (C.A. 9); *Bruton* v. *Schnipke*, 370 F. Supp. 1157 (E.D. Mich.).

tract of enlistment in the Air National Guard did not establish any express or *de facto* right to re-enlist.

Furthermore, respondent's status as a National Guard Technician created no greater entitlement to re-enlistment than that pertaining to any other member of the National Guard. While he maintained membership in the National Guard, respondent had a limited property interest in continued civilian employment, since by statute he could only have been removed for failure to meet military security standards or for cause. 32 U.S.C. 709(e)(2) and (3). But that interest did not survive the expiration of his enlistment. His status as a Technician did not confer any independent right thereafter to remain a member of the National Guard or in any way affect his exposure to the untrammeled military discretion in personnel retention decisions. See *Turner* v. *Egan*, 414 U.S. 1105, affirming 358 F. Supp. 560 (D. Alaska).

Respondent does not allege that his commanding officer denied his application for re-enlistment for constitutionally impermissible reasons or failed to follow applicable regulations. Absent such allegations, that decision is not subject to judicial review because there are no limitations on the commanding officer's discretion in retaining members of his unit, and thus no standards against which the propriety of his decision could be measured. Respondent's position was analogous to that of other federal employees whose employment is not protected by statute: he was subject to removal at the will of his superiors. *E.g., Cafeteria*

& Restaurant Workers Union v. *McElroy*, 367 U.S. 886. Therefore, even if it were assumed *arguendo* that respondent's application was rejected for non-military reasons, the court of appeals erred in holding that the denial could be reviewed by the judiciary.

2. Even if there were determinable standards against which to assess the commanding officer's exercise of discretion, the decision of the court of appeals nonetheless violates the longstanding judicial principle of noninterference with internal military decisions. In order to avoid unnecessary interference with military activities, federal courts have declined to review military personnel decisions absent strong justification. Respondent's mere contention that his superior officer abused a broad discretionary power in terminating his service did not provide a sufficient basis for subjecting the military decision to judicial scrutiny. *Reaves* v. *Ainsworth*, 219 U.S. 296.

The court of appeals held, however, that military decisions made for non-military reasons, and thus not requiring application of military expertise, are reviewable by the judiciary (Pet. App. A, pp. A–4 to A–5). This approach would require the courts to make an initial determination whether a military decision was made for military reasons, a burdensome process that would itself require application of military expertise and therefore implicate the factors supporting the noninterference doctrine. See *Mindes* v. *Seamans*, 453 F. 2d 197 (C.A. 5). Moreover, the decision of the

court of appeals improperly failed to recognize that the staffing of the armed forces, including consideration of applications for re-enlistment, necessarily requires exercise of specialized military judgment in personnel selection.

Finally, given the interrelationship of a National Guard Technician's military and civilian responsibilities, the rejection of respondent's application for re-enlistment, even if undertaken for the purpose of terminating his employment as a Technician without a showing of cause, was an inherently military decision that is not subject to review by the federal courts.

ARGUMENT

A MILITARY COMMANDER'S DENIAL OF AN AIR NATIONAL GUARD TECHNICIAN'S APPLICATION FOR RE-ENLISTMENT IN THE AIR NATIONAL GUARD IS NOT SUBJECT TO JUDICIAL REVIEW

The decision of the court of appeals turned upon its view of the proper scope of "the doctrine of nonreviewability of military decisions" (Pet. App. A, p. A–4). For the reasons set forth below (pp. 19–24, *infra*), we believe that the court of appeals misconstrued and misapplied that doctrine. But we further believe that, without regard to whether the denial of an Air National Guard Technician's application for re-enlistment is a decision military or non-military in character, it is nonreviewable because it is committed to the discretion of the decision-maker. It is to that argument that we first turn.

A. SINCE THE DENIAL OF AN APPLICATION FOR RE-ENLISTMENT AFFECTS NO PROTECTABLE INTEREST, IT IS NONREVIEWABLE WITHOUT REGARD TO WHETHER IT IS BASED UPON MILITARY CONSIDERATIONS

1. An ordinary member of the Air National Guard has no protectable interest in re-enlistment

A member of the National Guard has no statutory entitlement to re-enlistment. Although the statute authorizing the military services to accept re-enlistments establishes certain minimum qualifications (32 U.S.C. 313(a)), it does not grant any enlistee an affirmative right of re-enlistment.[7] It prescribes no set of conditions that, if fulfilled, entitle a member to re-enlistment. To the contrary, the decision on re-enlistment is committed to the discretion of the Secretary of the Air Force, who is authorized to "accept" re-enlistments in the Air National Guard. 32 U.S.C. 302(b).[8]

The Secretary's regulations do not circumscribe his discretion in any way relevant to this case. The processing of applications for re-enlistment is governed

[7] In contrast, certain limited classes of soldiers in the regular armed forces have a right to re-enlist. For example, an Air Force enlistee who serves as an officer in the Air Force or Air Force Reserve under temporary appointment is entitled to re-enlist in his former enlisted grade. 10 U.S.C. 8258. ~~In the absence of such a provision there is no right of re-enlistment in the regular armed forces former enlisted grade. 10 U.S.C. 8258.~~ Under special circumstances, Congress has from time to time enacted legislation providing soldiers on active duty a qualified right of re-enlistment. See *Diamond* v. *United States*, 344 F. 2d 703 (Ct. Cl.). These statutes, however, are no longer in force. In the absence of such a provision, there is no right of re-enlistment in the regular armed forces. *E.g.*, *O'Callahan* v. *United States*, 451 F. 2d 1390 (Ct. Cl.). See U.S.C. 505(e), 508, and 511.

[8] Moreover, in time of peace the Secretary is authorized to terminate a member's term of enlistment without cause. 32 U.S.C. 322(c).

by Air National Guard Manual 39–09.[9] An application for re-enlistment is subject to review by, and requires the approval of, multiple authorities within the military chain of command. *E.g.,* Manual, *supra,* paragraph 2–11 at pp. 2–9 to 2–10; see also *id.,* at p. A1–1. But the Manual does not create any right of re-enlistment, qualified or unqualified. With regard to "voluntary extension of enlistment", the Secretary's regulations simply provide that "[a]n enlistment or re-enlistment may be extended when an individual desires to continue in his Air National Guard status without a break in service." Paragraph 2–11 p. 2–9 (emphasis added). Like the authorizing statute, the regulations prescribe no set of conditions that, if fulfilled by a member, entitle him to re-enlistment.

Nor does a member's contract of enlistment establish any right to re-enlist. The relationship between a member and the Air National Guard, like that between an enlisted soldier and his military service, is contractual. Cf. *Bell* v. *United States,* 366 U.S. 393, 402–404. But standard fixed-term enlistment contracts, such as that governing respondent's membership in the Air National Guard, confer no right of re-enlistment. See, *e.g., O'Callahan* v. *United States,* 451 F. 2d 1390 (Ct. Cl.). Furthermore, there is no claim here that the Air National Guard follows a *de facto* re-enlistment policy that would establish a founded expectation of re-enlistment. Cf. *Perry* v. *Sindermann,*

[9] This Manual became effective September 10, 1971, and was amended March 14, 1972, before the expiration of respondent's last term ofenlistment.

408 U.S. 593. Accordingly, an ordinary member of the Air National Guard has no right of re-enlistment.

For similar reasons, the courts have consistently held that an enlisted soldier in the regular armed forces has no right of re-enlistment. See *O'Callahan* v. *United States, supra.* See generally Comment, *Back-Pay Issues in the Military: O'Callahan* v. *United States,* 10 San Diego L. Rev. 194, 199–201 (1972). Compare *Sims* v. *Fox,* 505 F. 2d 857 (C.A. 5). Thus in a suit brought by a former enlisted soldier for back pay on account of wrongful discharge during a fixed term of enlistment, damages are measured from the date of discharge to the date on which the term of enlistment would otherwise have expired; damages are not awarded beyond the latter date, for discretion to grant re-enlistment would otherwise have been exercised in the plaintiff's favor. *E.g., Bray* v. *United States,* 515 F. 2d 1383 (Ct. Cl.), *Davis* v. *United States,* 196 Ct. Cl. 517.[10]

2. An Air National Guard Technician has no more entitlement to re-enlistment than any other member of the Air National Guard

Although the National Guard Technicians Act does create certain limited tenure rights, an Air National Guard Technician has no special statutory entitlement to re-enlistment. During his membership in the National Guard, a Technician may be removed from his civilian employment only for failure to meet pre-

[10] In contrast, where the term of enlistment is indefinite, the government's liability for back pay for wrongful discharge extends from the date of discharge to the date that action is corrected. See *Hamlin* v. *United States,* 391 F. 2d 941 (Ct. Cl.); *Garner* v. *United States,* 161 Ct. Cl. 73.

scribed standards of military security or for other sufficient cause. 32 U.S.C. 709(e)(2) and (3). See also H.R. Rep. No. 1823, 90th Cong., 2d Sess. 11–12 (1968).[11] Thus, the statute confers a limited property interest in continued employment, while a Technician maintains membership in the National Guard.[12]

That interest, however, expires with the termination of that membership.[13] The Act is explicit that a Technician "who is separated from the National Guard * * * shall be promptly separated from his technician employment * * *." 32 U.S.C. 708(e)(1).[14]

Nothing in the Act or regulations thereunder qualifies or limits the military's discretion to separate a Technician from the National Guard; nothing in the Act or regulations confers upon a Technician, any more than upon other members of the National Guard,

[11] Of itself, such removal does not affect the Technician's membership in the Guard. See *Chaudoin* v. *Atkinson*, 494 F. 2d 1323 (C.A. 3).

[12] In his civilian capacity, a Technician may appeal from an adverse personnel decision, but only to the state adjutant general (32 U.S.C. 709(e)(5)); the removal of a Technician from his civilian employment during his membership in the National Guard implicates the procedural protections of due process. See *Davis* v. *Vandiver*, 494 F. 2d 830 (C.A. 5); *Chaudoin* v. *Atkinson*, 494 F. 2d 1323 (C.A. 3).

[13] By regulation, an Air Force Reserve Technician may retain his civilian employment if his separation from the Reserve was for reasons outside his control. See *Rolles* v. *Civil Service Commission*, 512 F. 2d 1319 (C.A. D.C.). A National Guard Technician has no comparable right.

[14] The reason for that provision is clear: a Technician cannot carry out the paramilitary responsibilities of his position without belonging to the National Guard. See pp. 5–7, *supra*.

any right or entitlement to remain or re-enlist in the Guard. In refusing to provide Technicians with such an entitlement, Congress intended that Technicians would be subject to the military's judgment on personnel retention on the same footing as other members of the National Guard, and that their retention of civilian employment would depend upon the exercise of that judgment. See Hearings on H.R. 2 before the Senate Committee on Armed Services, 90th Cong., 1st Sess. 221–222 (1967).

The statutory scheme governing Technicians is therefore simple and straightforward. As long as a Technician is permitted to remain in the National Guard, he retains a qualified right to continue in his employment as a Technician. But his status as a Technician carries with it no right to remain a member of the National Guard. Indeed, this Court apparently recognized in *Turner* v. *Egan*, 414 U.S. 1105, affirming 358 F. Supp. 560 (D. Alaska), that employment as a National Guard Technician creates no protectable interest in continued membership in the Guard. There, former Air National Guard officers who had been employed as Technicians while in the Guard challenged their forced retirement and consequent removal from civilian employment. In dismissing the officers' complaint, the three-judge district court implicitly found, *inter alia*, that the officers' employment as Technicians had not enlarged their right to remain in military service,[15] and this Court affirmed.

[15] The district court further concluded that the propriety of the military decision to retire the officers was nonjusticiable. See pp. 19–22, *infra*.

In short, a Technician, like any other member of the National Guard, may be denied re-enlistment for any reason or for no reason (within pertinent constitutional limitations), and during time of peace he may also be separated from the Guard without cause pursuant to regulation. 32 U.S.C. 322(c). Upon separation from the Guard for any reason, the Technician becomes ineligible for continued employment under the Technicians Act.

3. Since a National Guard Technician has no protectable interest in re-enlistment, a military commander's denial of a Technician's application for re-enlistment represents an exercise of nonreviewable discretion

As we have shown (pp. 11–16, *supra*), the decision to grant or deny a National Guard Technician's application for re-enlistment in the National Guard is initially committed to the discretion of his commanding officer and thereafter to the discretion of higher military authorities; no statutory or regulatory prescriptions circumscribe that discretion. A military commander's decision on a Technician's application for re-enlistment is therefore nonreviewable for the fundamental reason that there are no meet standards for judicial rview: there is no set of facts that the Technician could establish that would entitle him to reversal or vacation of the denial of his application.[16]

[16] This general rule is subject to qualifications not pertinent to this case. For example, review would be available to a Technician who challenged the denial of his application for re-enlistment on the ground that it had been motivated by a constitutionally impermissible consideration such as race. See, *e.g.*, *Wieman* v. *Updegraff*, 344 U.S. 183, 191–192; *Mindes* v. *Seamans*, 453 F. 2d 197 (C.A. 5). Cf. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100. Review would also be available to determine whether there had been compliance with the procedures established by regulation. See *Harmon* v. *Brucker*, 355 U.S. 579, 582. Review is available in those circumstances because the Constitution or regulations establish a standard against which official conduct can be judicially measured.

Similarly, where the denial of re-enlistment was explicitly predicated upon charges that were injurious to the Technician's reputation, due process considerations might entitle the Technician to an opportunity to clear his name (but not to review of the denial of re-enlistment *per se*). See *Board of Regents* v. *Roth*, 408 U.S. 564, 573.

This case involves no such complications, however. Respondent has not alleged that the denial of his application for re-enlistment was motivated by constitutionally impermissible considerations; that his commanding officer, in reviewing the application, failed to comply with the procedures established by regulation; or that the denial affected any constitutionally protected liberty interest in reputation. See also pp. 20–21, *infra*.

In this respect, a Technician who seeks to challenge the denial of his application for re-enlistment is in the same position as that occupied by federal civilian employees before the enactment of the Lloyd-LaFollette Act, 5 U.S.C. 7501 (or as that occupied by probationary federal employees today: cf. *Sampson* v. *Murray*, 415 U.S. 61). See *Matter of Hennen*, 13 Pet. 230; *Keim* v. *United States*, 117 U.S. 290; *Eberlein* v. *United States*, 257 U.S. 82; *Myers* v. *United States*, 272 U.S. 52; *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886.

For example, in *Matter of Hennen*, *supra*, a federal district court clerk challenged his removal by the district judge; the judge had acknowledged the clerk's competence and that the appointment of a replacement clerk was motivated by purely personal considerations. This Court held that it had no power to review the grounds of removal, since, at that time, all

appointed federal officers held their positions solely "at the will and discretion of some department of the government" (13 Pet. at 259). Similarly, in *Keim* v. *United States, supra,* the Court refrained from reviewing the grounds for discharge of a federal employee, holding that federal personnel matters are "peculiarly within the province of those who are in charge of and superintending the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers" (177 U.S. at 296). More recently, the Court again affirmed the "settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer." *Cafeteria & Restaurant Workers Union* v. *McElroy, supra,* 367 U.S. at 896.

Although this case involves denial of re-enlistment, rather than removal, the applicable principle is the same. A personnel decision that is committed to the unfettered discretion of the supervisor is not subject to judicial review on the merits. See *Sims* v. *Fox*, *supra*, 505 F. 2d at 861. Respondent's military commander possessed such discretion to grant or deny ~~his~~ his application for re-enlistment. If, for example, the commander chose to deny respondent's application for re-enlistment because he was dissatisfied with respondent's job performance as a Technician, it was his prerogative to do so. That decision is not subject to judicial review to determine whether the dissatisfaction was reasonable or factually based, because

nothing in the statute or regulations imposes those kinds of limitations on the commander's discretion.

Similarly, nothing required the commander to base his decision solely or principally upon "military reasons"; like the district judge in *Matter of Hennen,* the commander had nonreviewable discretion ~~even~~ to base his decision even upon purely personal considerations unrelated to the subordinate's ability adequately to carry out his assigned responsibilities. The court of appeals therefore erred in remanding this case to the district court to determine whether the denial of respondent's application was based upon military or non-military grounds: even if it were determined that the denial had been based upon non-military grounds, respondent would have no right to re-enlist or even to reconsideration of his application.

B. IN ANY EVENT, THE DENIAL OF A NATIONAL GUARD TECHNICIAN'S APPLICATION FOR RE-ENLISTMENT FOR THE PURPOSE OF TERMINATING THE TECHNICIAN'S CIVILIAN EMPLOYMENT REPRESENTS AN EXERCISE OF NONREVIEWABLE MILITARY JUDGMENT

If this Court concludes, contrary to the foregoing analysis, that identifiable standards exist for adjudicating the correctness or propriety of a military commander's decision to deny an enlistee's application for re-enlistment, it should nevertheless reverse because the particular decision challenged here, even as characterized by respondent in his pleadings, represented an exercise of nonreviewable military judgment.

1. The judiciary historically has avoided unnecessary interference with military decisions

To avoid impairing the military's effectiveness, the federal judiciary historically has avoided unnecessary

interference with internal military decisions. *Orloff* v. *Willoughby,* 345 U.S. 83; *Robinson* v. *Resor,* 469 F. 2d 944 (C.A. D.C.); *Cortright* v. *Resor,* 447 F. 2d 245 (C.A. 2), certiorari denied *sub nom Cortright* v. *Froehlke,* 405 U.S. 965. See also *Burns* v. *Wilson,* 346 U.S. 137, 144. Cf. *Parker* v. *Levy,* 417 U.S. 733, 743. Judicial review of military decisions will not be undertaken absent a strong showing of a countervailing right. *Mindes* v. *Seamans,* 453 F. 2d 197 (C.A. 5); *Cortright* v. *Resor, supra.*

In particular, the courts have not reviewed military personnel decisions without strong justification. An allegation of deprivation of constitutional rights may provide a sufficient predicate for such review. *Orloff* v. *Willoughby, supra*; *Mindes* v. *Seamans, supra.* Similarly, federal courts will scrutinize such actions to determine whether the armed forces followed their own regulations and whether the deciding officers acted within the scope of their authority. *Harmon* v. *Brucker,* 355 U.S. 579; *United States ex rel. Schonbrun* v. *Commanding Officer,* 403 F. 2d 371 (C.A. 2), certiorari denied, 394 U.S. 929. But a military officer's otherwise lawful actions will not be reviewed by the judiciary merely upon the claim of arbitrary or capricious abuse of discretion. See *Turner* v. *Egan, supra*; *Reaves* v. *Ainsworth,* 219 U.S. 296. As this Court stated in *Orloff* v. *Willoughby, supra,* 345 U.S. at 93–94:

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. * * * Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

At bottom, respondent's claim appears to be that he was injured by his commanding officer's abuse of an overly broad discretion. In the absence of a clear congressional directive to the contrary, that is the kind of contention that historically has been treated as nonjusticiable in the military context. In undertaking review, however, the court of appeals concluded that "[t]he primary rationale for the doctrine of nonreviewability of military decisions lies in the civil courts' 'unwillingness to second-guess judgments requiring military expertise' * * * [b]ut decisions which are made for non-military reasons involving no application of military expertise [are] outside the boundaries of the doctrine of nonreviewability" (Pet. App. A, pp. A–4 to A–5).

In our view, the court of appeals erred in several respects in reaching and applying this conclusion. First, we believe that the judiciary is ill-equipped to attempt to determine whether the reasons for a given military decision are military or non-military. The determination whether a particular military judgment did or did not require the "application of military expertise" may itself require military expertise. Judicial efforts at making such determinations would pose the risk of uninformed meddling in matters of genuine military concern. Cf. *Gilligan* v. *Morgan,* 413 U.S. 1.

Moreover, the rule adopted by the court of appeals would open a Pandora's box of judicial review: every military decision would become subject to review to determine whether, in the eyes of the reviewing court, the reasons for the decision were suitably "military." We see no reason to impose this burden upon either the military or the courts. The better approach is the one represented by this Court's decisions: in the absence of a strong showing of countervailing right, a military decision is nonreviewable without any requirement that the military make a particularized showing that the decision involved application of military expertise.

Second, contrary to the opinion of the court of appeals, military personnel decisions, and especially decisions on applications for re-enlistment, inherently require the exercise of military expertise. The decision on who is to remain in the military unit and who is to leave requires consideration of a wide range of factors bearing upon effectiveness and morale, many of which entail subjective evaluation. Such decisions involve the commander's seasoned military judgment concerning the needs of the unit. Cf. *Orloff* v. *Willoughby*, *supra*, 345 U.S. at 94. Judicial reconsideration of such decisions would impede the most basic of military functions, the mustering of the force.

Third, whatever may be the rule with respect to military personnel decisions generally, a decision to deny a National Guard Technician's application for re-enlistment, for the purpose of expeditiously terminating the Technician's "civilian" employment,

plainly involves the application of military expertise. It is to this argument that we now turn.

2. The decision to terminate a National Guard Technician's employment serves a predominantly military purpose

A military commander's decision to deny a soldier's application for re-enlistment could be based upon one of any of a number of factors or upon a matrix of considerations. Respondent's only allegation here, however, is that he was denied re-enlistment for the purpose of expeditiously removing him from his position as a National Guard Technician without a showing of cause. But the purpose of expeditiously removing an unsatisfactory Technician is manifestly military. Thus, even under its own rationale, the court of appeals erred in vacating and remanding to the district court.

We have already described the responsibilities of a National Guard Technician. See pp. 5–7, *supra*. Those obligations are military in nature: the Technician is a member of the National Guard unit who, in order to maintain the unit's combat readiness, carries on the work of the unit during the civilian work week while the other members are engaged in unrelated employment. The Technician is responsible both for the unit's operational functions and for training his fellow soldiers. Accordingly, satisfactory performance by the Technicians of their job responsibilities is crucial to the military preparedness of the National Guard.

Because of the literally inextricable interrelationship of respondent's military responsibilities as a soldier and his "civilian" responsibilities as a Technician, his performance as a Technician necessarily

affected the military efficiency of his unit and therefore was an appropriate military consideration in determining whether his re-enlistment would be in the unit's best interest. Although respondent's performance as a Technician may not have been sufficiently unsatisfactory to warrant his removal from that position for cause during his term of enlistment, his competency in that role was a proper military criterion for determining whether to continue his civilian employment upon the expiration of his contract and whether to accept his application for re-enlistment.

Thus even if, as the court of appeals held, military personnel decisions may be reviewed by the courts to determine whether they were based upon military or non-military grounds, and, in the latter case, whether they were arbitrary or capricious, the grounds alleged by respondent in his complaint were military and therefore the decision he challenges is beyond the reach of judicial review.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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